BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF COURTS BELOW.

The opinion of the District Court is found in 29 Fed. Supp. 15 and at record page 31. The opinion of the Circuit Court of Appeals is found in 118 Fed. (2d) 615.

STATEMENT OF JURISDICTION.

The jurisdiction of this Court is based upon Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; Title 28, U. S. C. A., Sec. 347, providing for review by this Court, by certiorari, of decisions of the Circuit Courts of Appeal. The judgment of the United States Circuit Court of Appeals sought to be reviewed was entered on April 1, 1941 (Rec. p. 624).

STATEMENT OF THE CASE.

Petitioners tried exhaustively both before and after the strike, which commenced in September, 1938, to reach a settlement of the controversy with the Union. Despite all of the conferences that were held and despite all the efforts exerted no settlement was ever effected, primarily because of the Union's adamant and persistent refusal to recede from its position demanding a closed union shop. While these conferences were being held during the latter part of 1938 and early part of 1939, the Company was operating its plant with many employees at work, consisting of strikers who upon invitation of the Company had returned to their jobs and other employees. As found by the District Court by January 25, 1939, a majority of the strikers had returned to their jobs and more returned after that date (Rec. p. 630). Therefore, the Union's persistent demands after that date for a union

shop, if yielded to, would have had the effect of causing the Company to sign an exclusive recognition colective bargaining agreement imposing union membership as a condition of employment on a majority of the employees in the bargaining unit who, according to the contention of the Company, by forsaking the strike had revoked their designation of the Union as bargaining agent The result of this would have been to cause the Company to violate the provisions of the National Labor Relations Act. Section 8 (3) of the National Labor Relations Act permits the signing of closed shop contracts if the labor organization is the representative selected by a majority of the employees. By necessary implication the Company cannot enter into a closed shop contract with a Union which does not represent a majority of the employees.

Although the Pauly Company had virtually retumed to normal operations in its plant in respect to production of its product, the Union was causing the Company great difficulty with its customers, contractors and other persons with whom it dealt (Rec. p. 45). The Union had importuned many persons doing business with petitioners in various capacities, such as contractors, divisions of the Federal Government, and smaller divisions of various states or local governments, employees of the Company and employees of contractors, not to engage further in their respective business dealings with petitioners (Rec. p. 44). Therefore the Company was in the inextricable position of not being able to accede to the Union's demands for a closed union shop without violating certain Federal statutes and of not being able to carry on its business without the interference with and the interruption of its business by the Union because of the Company's refusal to meet its demands and to violate the Federal law. The Company had no other alternative but to seek redress in a court of equity.

The District Court in granting the relief prayed for did so in full compliance with the provisions of the Norris-La Guardia Act and gave the petitioners only such relief as it was permitted to grant within the narrow limits of the Norris-La Guardia Act. The prohibitions contained in the injunctive decree were specifically confined to such conduct of the Union in carrying on its secondary boycott as was based upon or involved fraud (Rec. p. 55). The United States Circuit Court of Appeals for the Eighth Circuit reversed the decision of the District Court.

Petitioners submit that the decision of the United States Circuit Court of Appeals is erroneous in four material respects.

SUMMARY POINTS OF ARGUMENT.

1. The term "fraud" as used in the Norris-La Guardia Act is to be construed in the same sense as the term is used "to constitute the foundation for ordinary equitable relief," and is not to be given a more narrow construction so as to exclude the type of conduct engaged in by the Union in the instant case.

2. The fact that a majority of the strikers returned to work across the picket line in defiance of the strike constitutes a renunciation and repudiation of the Union as their collective bargaining representative.

3. The willingness of the company to bargain with the Union as exclusive bargaining representative until shortly prior to the institution of this action in the District Court does not excuse or remove the taint of fraud from the Union's conduct.

4. The District Court had jurisdiction of this case by reason of the fact that violations of three federal statutes are involved, viz., the National Labor Relations Act, the Sherman Anti-Trust Act and the Clayton Act.

ARGUMENT.

I.

As stated, the Union was charged with falsely representing to customers, contractors and others that the company was unfair in refusing to execute a collective bargaining agreement containing a closed shop provision at the time when the Union did not represent a majority of the workers. The falsity of the representation rises out of the implication that the Union did represent a majority of the workers and therefore had a legal right to demand and expect of the company that it should enter a collective bargaining agreement, when in truth and in fact the Union did not represent a majority of the workers and was therefore not entitled to demand a closed or union shop contract because the company could not under the provisions of the National Labor Relations Act enter into such an agreement with it.

The Circuit Court of Appeals held that even though such false statements may have been made by the Union this was not the type of fraud which Congress intended to cover by that term as used in Section 4, Subsections (e) and (i) of the Norris-LaGuardia Act (29 U. S. C. A., Sec. 104), quoted as follows:

> (e) "Giving publicity to the existence of or facts involved in any labor dispute, whether by advertising, speaking, patrolling or by any other method not involving fraud or violence."
>
> * * * * * * *
>
> (i) "Advising, urging or otherwise causing or inducing without fraud or violence the acts heretofore specified."

The Circuit Court of Appeals stated that "the unmistakable public policy which it (the Act) declares does not

leave room for a mere academic concept (of fraud), such as may constitute the foundation for ordinary equitable relief" (Rec. p. 626). In support of this the opinion cites **Wilson & Co. v. Birl**, 105 Fed. (2d) 948 (C. C. A. 3), and **Cinderella Theatre Co. v. Signwriters' Union**, 6 Fed. Sup. 164 (D. C. Mich.), which hold that accusations of unfairness against an employer by a Union are mere expressions of opinion, and though misrepresentative, do not constitute a fraud within the meaning of the above-quoted provisions of the Act. But these cases are clearly distinguishable from the situation presented here, for the reason that the false statements of the Union in this case are not mere expressions of opinion about the company's unfairness, but are actual false statements of fact to the effect that the Union represented a majority of the employees when in truth it did not. In the **Wilson** and **Cinderella** cases the Unions made no false statements of **actual fact** when they set themselves out as representatives of a majority of the workers with whom in their opinion the company was not dealing fairly. But in the instant case the Union not only misrepresented matters of opinion, but falsely stated certain material facts. Furthermore, the **Wilson** and **Cinderella** cases cannot be considered authority for the view that "fraud" is used in the Act in a narrower sense than that which constitutes the basis for ordinary equitable relief, for the reason that mere false statements of opinion do not constitute fraud in its ordinary legal meaning. 27 Corpus Juris 32, Sec. 149. Thus the **Wilson** and **Cinderella** cases cannot be of any great moving force in determining the question of whether or not the term "fraud" is to be given its usual construction as forming the "foundation for ordinary equitable relief."

In declaring that the word "fraud" in the Act must be construed in a much more limited sense than is ordinary fraud and in a sense that would not include false statements of fact by a Union, the Court of Appeals said:

> "What Congress accordingly **must be regarded** as having intended in the situation was to leave the Federal courts free to enjoin those permeative acts falling within the term 'fraud' or 'violence' which an unsluggish public conscience and a healthy social order cannot soundly tolerate even at the risk of thereby enabling one of the parties to tip the scales of the fundamental dispute" (Rec. p. 627).

Before concluding what Congress "must be regarded" as having intended, we believe reference should be made to the Congressional Record for the true meaning of any legislation. The discussions in Congress on this particular point during consideration of the Norris-LaGuardia Act were rather meager, but those which appear in the Record serve only to confirm petitioners' contention that fraud must be given its ordinary, usual meaning. An interesting light on this controversy is thrown by comments of a representative of the American Federation of labor, with which the respondent Union is affiliated, at a hearing before the House Judiciary Committee on February 25, 1932 (U. S. Gov. Pamphlet No. 105105, p. 56). Mr. James B. Easby-Smith, counsel for the American Federation of Labor, in rebuttal to arguments against the Act by persons who opposed the legislation on the ground that it was unconstitutional, said:

> "Now, then, in support of the argument (that the Act is unconstitutional) they cite the case of Truax v. Corrigan (257 U. S. 312). Arizona had passed a statute almost identical with Section 20 of the Clayton Act. There was a strike. It involved disorderly conduct. The facts in the case clearly showed that there was violence, threats, **libelous publications and other acts of fraud**, and the Supreme Court held that the Arizona statute was unconstitutional."

Inasmuch as Mr. Easby-Smith was discussing the passage of the Norris-LaGuardia Act in its final form, there can

be little doubt that it was clear to the American Federation of Labor, through its counsel, that false and libelous publications were included in the meaning of fraud as that term appeared in the draft of the Act.

Two years earlier, at a hearing of a Subcommittee of the Senate Judiciary Committee on April 22, 1930 (U. S. Gov. Pamphlet No. 114976, p. 34), Mr. Andrew Furuseth, president of the International Seamen's Union of America, the author and originator of the Shipstead Anti-Injunction Bill, who opposed passage of the Norris-LaGuardia Act because he felt that the federal courts should have no equity jurisdiction whatsoever in labor disputes (other than to protect "tangible property") wrote the following comments into the Record of the Subcommittee hearing on the meaning of fraud in section 4:

> "Section 4 undertakes to make this policy effective by specifically stating what may be done by members of labor organizations, individually and collectively, and then closes as follows:
>
> > " '(i) Advising, urging, or otherwise causing or inducing without fraud or violence, the acts heretofore specified, regardless of any undertaking or promise as is described in Section 3 of this Act.'
>
> "Fraud is described in Bouvier's Law Dictionary as 'an endeavor to alter rights by deception—touching motives or by circumvention not touching motives,' and again 'actual or positive fraud includes cases of the intentional and successful employment of any cunning, deception or artifice used to circumvent, cheat or deceive another (Story),' and again 'legal or constructive fraud includes such contracts or acts as though not originating in any actual evil design or contrivance to perpetrate a fraud, yet by their tendency to deceive or mislead others or to violate private or public confidence are prohibited by law,' and again 'what constitutes a specific case of fraud

in the view of the courts of equity it would be difficult to specify. It is indeed part of the equity doctrine of fraud not to define it—not to lay down any rule as to the nature of it lest the craft of men should find ways of committing fraud which might escape the limits of such rule or definition.' "

Furuseth after discussing the meaning of the word "violence", then said:

"* * * **Would it not be difficult to find two qualifying words the significance of which would be broader and more comprehensive?"**

From this last sentence it is clear that Furuseth opposed the legislation the provisions of which would retain in the federal courts the power to enjoin acts of fraud and violence for the very reason that these exceptions to the operation of the Act were of a necessarily broad and comprehensive nature. Nowhere, either in Congress or during the hearings of congressional committees, was there any challenge to Furuseth's statements that the word "fraud" has a broad and not a narrow meaning. If it was the intent of Congress to make the word narrow in scope there is certainly no indication of it, even when the broadness of the term was expounded.

In 1930 a discerning book entitled "The Labor Injunction," by Frankfurter and Greene, was completed, which work is generally regarded as having crystallized the movement for a curtailment of the power of federal equity courts in labor disputes, and which became the authority for solution of problems of fact and law arising during the process of passing the Act. The view of this work as to the extent to which organized labor should be free from interference is summed up in the following statement from page 26:

"When the objectives of concerted action are higher wages, shorter hours or improved working conditions,

all measures in themselves not **tortious** may be employed."

Since false and libelous statements of actual fact obviously **are** the proper subject of action in tort for fraud or libel, it seems to follow that the terms "fraud" and "violence" would include any acts giving rise to ordinary equitable or legal relief.

Portions of a speech of Senator Norris himself made in the Senate on February 23, 1932 (72nd Congress, First Session, Congressional Record Vol. 75, Part 4, p. 4506), are informative. The Senator, arguing in support of the bill and speaking about the abuse of the injunction, which he felt was in dire need of curbing, set out several recent injunctions which had come to his attention and which were very broad in scope and which he felt worked great hardship on the unions. One of these had been issued by a District Court for the Northern District of Iowa, and of it the Senator said:

> "This injunction enjoined the defendants from doing many things. Among others it enjoined them from
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> '* * * printing, publishing, issuing, circulating and distributing or otherwise communicating, directly or indirectly, in writing or verbally, to any person, association of persons or corporation, any statement or notice of any kind or character whatsoever stating or representing:
>
> '(1) That there is a strike at the mill or plant of complainant at Fort Dodge, Iowa; or that the strike of 1921 is still in existence; or that there is a controversy over wages or conditions of employment between complainant and its employees; or any false statement with reference to conditions of employment at complainant's plant.'
>
> "Let me invite your attention to that word 'false,' because some one will say the injunction is against false statements of this kind. Not at all. The state-

ment may be absolutely true. The only case where the word 'false' applies is 'any false statement with reference to conditions of employment at complainant's plant.' "

In other words, Senator Norris was decrying the use of injunctions prohibiting unions from making truthful statements of fact. The necessary implication from his discussion and from his reference to the use of the word "false" is that so long as a court of equity limits its prohibition to false statements, the Court works no great hardship upon a given union. In the absence of any other discussion or debate on the meaning of the term "fraud" during the congressional consideration of the Norris-La Guardia Act, we must of necessity take the word "fraud" to have been intended by Senator Norris to mean "false" statements.

Above and beyond these few instructive viewpoints gleaned from the Congressional Record, it seems inescapable that the word "fraud" in the Norris-La Guardia Act must be measured by the same yardstick with which it is ordinarily measured. If Congress had intended it to have any other meaning, it would have so limited it by clear provision. The whole purpose of the Norris-La Guardia Act was to limit in clear terms the powers of federal courts in granting injunctions—that is to say, its whole aim and purpose was one of limitation. This being so, if Congress had intended to use the word "fraud" in a narrower or more limited sense than its usual meaning, it would likewise have clearly defined the word in its limited use. The normal use of the term is such as does constitute "a foundation for ordinary equitable relief."

As stated earlier, the charges of unfairness by the union amounted to more than mere expressions of opinion. They were statements of erroneous facts designed to mislead the public. They were acts of a "tortious" nature which would normally have formed the basis for ordinary equitable relief.

The Circuit Court of Appeals in its opinion (Rec. p. 627), as quoted above, says:

> "What Congress accordingly must be regarded as having intended in the situation was to leave the Federal courts free to enjoin those permeative acts falling within the term 'fraud or violence' which an unsluggish public conscience and a healthy social order cannot soundly tolerate. * * *"

In announcing this view the Court starts from the premise that the "dignity of the State has always demanded that certain forms of conduct be not permitted to become the controlling basis for disposing of individual or social controversies." Acts of fraud have always been regarded as forms of conduct which have been consistently, for a long time, prohibited in preservation of the "dignity of the State." Fraud normally would fall within this premise of the Court's reasoning and has always formed the basis for equitable relief. Therefore the Court's conclusion that only those permeative acts which the public cannot tolerate were intended by Congress to remain subject to injunction is based upon a premise which includes the petitioners' theory of the word "fraud," i. e., that fraud has always been regarded as such "permeative act" which the public could not tolerate and which has always formed the basis for equitable relief.

"Fraud" in the Norris-La Guardia Act must be taken in its normal and usual sense, and if taken in that sense covers the conduct engaged in by the Union in this instance. It would normally have been the basis for equitable relief and, since it was excepted from the limitations laid down by Congress on the powers of federal courts, the District Court is left free in this instance to enjoin the false and fraudulent misstatements of fact engaged in by the Union.

II.

The Circuit Court of Appeals further held that the Union had committed no fraudulent act by reason of the fact that the Court was of the opinion that the return to work of a majority of the strikers did not constitute revocation of their prior designation of the Union as bargaining agent (Rec. p. 630). The District Court found it to be a fact, and the Court of Appeals affirmed the finding, that "It would appear, as the trial court held, that a majority of the employees had abandoned the strike by January 25, 1939" (Rec. p. 630). Nevertheless the Court of Appeals ruled that the Union occupied a dual status with reference to the strikers. In the one sense it was a Union as such, i. e., an association of working men engaging in concerted activities, and in another sense it was also a bargaining representative designated by a majority of the employees in the given bargaining unit, irrespective of membership in the organization. The Court of Appeals reasoned that although the striking employees returned to work and obviously abandoned the Union as such, nevertheless the returning to work did not operate to revoke the designation of the Union as bargaining agent in its other function.

Granting that a labor union does occupy a dual status and does have a dual function, nevertheless the petitioners still contend that the abandonment of the strike likewise acted as a revocation of the designation of the Union as bargaining agent. We believe that after reflection and a study of this phase of the problem there can be no doubt that this is the necessary conclusion.

To begin with, the designation of the Union by a majority of the workers in the plant was not shown in any official way, i. e., there was no certification by the National Labor Relations Board. Originally the Union was recognized as the exclusive collective bargaining agent designated by a majority of the workers in the unit by

agreement between the Company and the Union in the Spring of 1937. Such agreement expired in the Spring of 1938 and thereafter there was no act of the employees signifying designation of the Union until September 22, 1938, when a majority of the employees went on strike. In other words, by their act of striking the employees by a substantial majority designated the Union as their bargaining agent.

That designation of a bargaining agency can be accomplished by employees going on strike is the interpretation placed upon the appropriate provisions of the National Labor Relations Act by the National Labor Relations Board. **In the Matter of Rollway Bearing Co., Inc.**, 1 N. L. R. B. 651, the Labor Board commented on the fact that 140 out of 180 employees went out on strike and concluded that the "record clearly indicates that a majority of the employees adhered constantly and consistently to the Union."

In another opinion (**In the Matter of Denver Automobile Dealers Ass'n**, 10 N. L. R. B. 1173, l. c. 1189) the Board said:

> "Another important consideration in determining whether Lodge 606 represented a majority of the employees in the appropriate unit is the fact that 12 (out of 19) employees within the unit went on strike on July 30th and followed the leadership of Lodge 606."

The question was raised **In the Matter of M. H. Ritzwoller Company**, 15 N. L. R. B. 15, as to whether or not the Union represented a majority of employees in the appropriate unit. The Union had submitted applications for membership signed by a number of the employees and the Board added:

> "Moreover, it was corroborated by the fact that the employees supported the Union on June 17th by striking for its recognition."

The Board concluded that the Union was duly designated as the representative of a majority of the employees for the purposes of collective bargaining.

The language used in the opinion written in **In the Matter of United Fruit Company**, 12 N. L. R. B. 404, l. c. 410, is also pertinent:

> "We are of the opinion that under all the circumstances of this case participation in the strike by an ample majority of the men and their obvious acquiescence in and support of the I. L. A.'s assumption of the direction and control of the strike and settlement, coupled with the wearing of I. L. A. buttons, constituted an adequate designation of the I. L. A. as their bargaining representative."

To the same effect is **In the Matter of Blanton Company**, 16 N. L. R. B. 951, 954.

From all of these cases it seems clear that going on strike is recognized as a proper form of designating a given union as collective bargaining representative. It must follow, then, that abandonment of the strike, quitting the Union and returning to work in defiance of the picket line, must of necessity be considered a revocation of the previous designation.

In the trial of this case in the District Court the Union introduced no union cards or applications for membership showing the designation of the Iron Workers' Union as the bargaining agency of the Pauly employees. The Union relies purely and simply on the fact that the employees went on strike as proof of the designation as bargaining agent. If the Union relies merely on the going on strike as its authority to represent the employees, then necessarily the fact that a majority of the employees left the strike and crossed the picket line and went back to work indicates that they no longer desired the Union to represent them.

A majority of the employees testified in the trial in the District Court that they had ceased paying union dues—some of them in July, some in August, some in September and October of 1938 (Rec. p. 43)—in any event, long before January 25, 1939, the date on which the District Court found that the majority had repudiated their designation of the Union (Rec. p. 32).

The Labor Board, in the case of **In the Matter of Alaska Juneau Gold Mining Co.**, 9 N. L. R. B. 755, held that "the lapse in the dues payments of seventy-two employees raises some ground for doubt as to their continuing desire to be represented by the Juneau Union * * *." Thus, in another respect—that of dues payments—the employees manifested their revocation of the designation of the Union as their bargaining representative.

Coming a little closer to the exact point, i. e., that working in defiance of a strike indicates repudiation of the Union as bargaining agent, is a ruling by the National Labor Relation Board in **In the Matter of French Maid Dress Company**, 5 N. L. R. B. 325. The Union there contended that it represented the forty-five employes who signed cards authorizing the Union to represent the signers for the purposes of collective bargaining. At the Labor Board hearing there was testimony that one person who had signed a union card had continued to work in the factory during the strike called by the Union. The Board's ruling with respect to this employee is as follows:

> "Such testimony may indicate that the employee has impliedly repudiated her prior authorization to the Union to represent her for the purposes of collective bargaining. Accordingly, we shall exclude her card in this proceeding in making a determination of the representative."

Still more analogous is a case decided by the National Labor Relations Board in **In the Matter of Sunshine Min-**

ing Company, 7 N. L. R. B. 752. Here the company contended, as do we, that many employees who had previously designated the Union as collective bargaining agency revoked the agency when they walked through the picket lines. The Board rejected this position, but only for the collateral reason that the company had committed an unfair labor practice in refusing to bargain with the company, thus forcing the Union to call the strike. The unfair action of the company was considered to have alienated a number of the members of the Union. The necessary inference and conclusion is that the Board would recognize such an argument if the company had not engaged in the unfair labor practices causing the strike.

The Pauly Jail Building Company has never engaged in any unfair labor practices, and although the Labor Board had the case under investigation, no charges were ever filed, thereby completely exonerating the company from any alleged violation of the National Labor Relations Act. Thus no unfair acts by the company caused the Union members to cross the picket lines. They did so freely and of their own accord. It is submitted, therefore, that such action must be regarded as a revocation by such employees of the Union's agency.

By reference to the general law of agency, it is well established that revocation of an agency may be accomplished by conduct inconsistent with the designation. In 2 Corpus Juris Secundum 1165, Sec. 77, it is said:

> "In the absence of an agreement as to the manner of revocation, to constitute a revocation no particular act is required; it is only necessary that it be made clear that the principal has withdrawn from the agent his authority to act for him. * * * The manner adopted by the principal must be one which clearly and unequivocably communicates to the parties to be affected that the authority of the agent has been withdrawn. * * * A revocation of the agent's authority

> may also be implied from the words and conduct of the principal where these are inconsistent with the continuation of the authority * * *."

In the case of **Kilpatrick v. Wiley**, 95 S. W. 213, 197 Mo. 123, the Supreme Court of Missouri supports this view:

> "A power to sell may be revoked by a sale of the subject matter by the donor of the power or a sale by another agent, by death, by express revocation, or by the performance of some act resulting in its revocation by necessary implication."

The return to work by the striking employees in defiance of the strike and the picket line is so inconsistent with the idea of a continuation of the agency as to leave no room for doubt as to the intention of the returning employees. As a matter of actual fact, it is common knowledge that any striker who quits the Union's cause during a strike and goes back to work is held in such complete contempt and derogation by the remaining strikers as to leave no doubt about the general feeling of both parties. It is a matter of common practice that vile names and epithets are commonly given to such persons going back to work and crossing the picket line by the remaining strikers denoting the Union's contempt for such persons, and it necessarily follows that anyone adopting that position has very clearly and emphatically indicated his desire no longer to be represented by the Union and his revocation of the Union's authority to act for him. Therefore, since revocation of the Union in this instance was accomplished by the return to work of a majority of the employees on or before January 25, 1939, any statement by the Union after that date which expressly or by implication represented that the Union was thereafter the duly constituted bargaining agent for the majority of the employees for this company and entitled to exclusive recognition, as such was an intentional, known and willful misstatement of a fact.

III.

The next point in the opinion of the Circuit Court of Appeals was, in substance, that the conduct of the petitioners in offering to recognize the Union as the exclusive collective bargaining agency after January 25, 1939, removed any taint of fraud from the Union's conduct.

It must be borne in mind that the petitioners resorted to litigation in the courts in June, 1939, as the only remaining alternative after all efforts at conciliation and compromise were exhausted. The company tried for months after the strike had commenced, at numerous conferences, to reach a settlement of the controversy with the Union. The negotiations for settlement which were carried on with the Union after January 25, 1939, i. e., after a majority of the employees had repudiated the Union, were carried on by the company for the purpose of trying to settle an industrial dispute in observance of the general policies to that effect announced by Congress in the Norris-La Guardia Act and the National Labor Relations Act. In bargaining with the Union and making offers to recognize it exclusively at times when the Union did not represent a majority, the Company was in good faith trying to settle a social controversy. The Company was very obviously not trying to lay a foundation for litigation. But after exhausting all efforts for a compromise the petitioners then were obliged to take the only course open, namely, a resort to the courts. In appealing to the courts, the facts presented were those as they actually were, unchanged by any offers of compromise. The efforts on the part of the company to compromise the controversy were much like any offers to settle an existing legal controversy. Offers of that nature cannot be used against the party seeking compromise. The Court of Appeals felt that this conduct removed the taint of fraud from the Union's conduct and said, "There is no contention that the Union deceived the company in the

situation" (Rec. p. 634). Quite naturally the company was not deceived by the Union's action. The deception was practiced upon the public and the customers, contractors and persons or agencies from whom the petitioners secured their business. Quite naturally such persons were unfamiliar with the facts of the controversy and had no knowledge of whether or not the petitioners had good reason to refuse to enter into a closed union shop contract with the Union. Whether the company carried on conferences during which it was willing to recognize the Union as exclusive bargaining agent for the purpose of compromising the conflict has absolutely no relation to the Union's sending communications to the petitioners' business friends misstating existing facts. The misstatements were there in fact unmitigated by the very laudable effort on the part of the company to seek an end of the controversy.

We submit that the company was, prior to the institution of this suit, up against a blank wall. It could not accede to the Union's demands without violating the law. It was suffering the ruination of its business because of the unlawful acts of the Union. Petitioners tried their utmost to settle the controversy, but the Union adamantly refused to do so upon any grounds which did not require the compulsion of a majority of the employees to be and remain members of the Union against their will. The Union's conduct was unlawful from two viewpoints. Their conduct amounted to a conspiracy not only to accomplish an unlawful end, but was being carried on by unlawful means. The unlawful end consisted in carrying on an unlawful secondary boycott in violation of the Sherman Act as construed by the cases of **Loewe v. Lawler**, 208 U. S. 274; **Duplex Printing Press Co. v. Deering**, 254 U. S. 43; **Bedford Cut Stone Co. v. Journeymen's Stone Cutters Ass'n**, 274 U. S. 37. The unlawful means consisted of the fraud-

ulent misrepresentations engaged in by the Union in seeking to interrupt and restrain the petitioners' interstate business.

IV.

In a concurring opinion Circuit Judge Woodruff found that the federal court had no jurisdiction of this case (Rec. p. 635). While petitioners feel that, since this is not the opinion of the Court and in the absence of a similar point being made in the principal opinion it is therefore not to be considered as having formed any basis for the action of the Court in reversing the District Court's judgment, nevertheless petitioners desire to offer their contrary contentions in order not to appear to acquiesce in any ruling which petitioners believe to be untenable.

To begin with, the concurring opinion says:

> "* * * and the only ground of jurisdiction is asserted violation of the Sherman Anti-Trust laws as amended."

This is not an accurate appraisal of the case, we believe, as will be demonstrated presently.

In finding that the Court had no jurisdiction on the ground of alleged violation of the Sherman Anti-Trust Act, the Court relies upon the Supreme Court's rulings in **Apex Hosiery Company v. Leader**, 310 U. S. 469, 487, 60 S. Ct. 982, 988, 84 L. Ed. 1311, and the case of **United States v. Hutcheson**, 61 S. Ct. 463, 464, 85 L. Ed. ..., decided February 3, 1941. We believe that the instant case is clearly distinguishable from the **Apex Hosiery Company** case. In the **Apex** case the Court held there was no violation of the Sherman Act, although there had been shown a substantial interruption in the company's interstate trade. The Court found that the restriction in the shipments by means of seizure of the Apex plant had not operated to re-

strain commercial competition in some substantial way. The Supreme Court in the **Apex** decision, in distinguishing that case from those of **Loewe v. Lawler**, supra; **Duplex Printing Press Co. v. Deering**, supra, and **Bedford Cut Stone Co. v. Journeymen's Stone Cutters Assn.**, supra, said:

> "It will be observed that in each of these cases where the Act was held applicable to labor unions, the activities affecting interstate commerce were directed at control of the market and were so widespread as substantially to affect it. There was thus a suppression of competition in the market by methods which were deemed analogous to those found to be violations in the non-labor cases."

In the **Apex** case it was found that the action of the labor union had not resulted in suppressing competition in the market. On the contrary, however, the action of the Iron Workers Union in the instant case very definitely had the effect of suppressing competition in the market. As found by the District Court in Finding of Fact No. 2 (Rec. p. 40):

> "There are few companies in the United States engaged in this same business. Plaintiffs in this action furnish a substantial percent of this kind of equipment, which is used throughout the United States. * * * Any substantial interference with plaintiffs' business will substantially impair the market and price of this character of equipment throughout the United States."

In other words, there are very few companies in this country which engage in the business of building jails. The vast curtailment of this company's business activities as a result of the Union's unlawful conduct had the result of eliminating one of the few competitors in this field in the country and necessarily resulted in a very substantial suppression of the competition. This would obviously very

materially affect the market price for such commodities. This is the natural and logical result of the elimination from competition of the Pauly products and the Union must be taken to have intended the natural and probable consequences of their acts. Therefore they must be taken to have intended to interfere with and restrain interstate commerce and to suppress competition and affect prices in this industry.

The **Hutcheson** case, supra, relied upon in the concurring opinion to show that the Court had no jurisdiction in this case, is likewise not applicable. The **Hutcheson** case holds that the Norris-La Guardia Act reinforces the Clayton Act in granting immunity from injunction to certain forms of labor union activity. But the Norris-La Guardia Act, even though it does greatly tighten up this field of judicial action, still by its own terms leaves the field open in respect to union conduct involving fraud or violence. The element of fraud as manifested in the Pauly case by false statements of fact, is contrasted with mere expressions of opinion as to unfairness as manifested in the **Hutcheson** case. Therefore the constructions placed upon the Sherman and Clayton Acts by the **Duplex** and **Bedford** cases still stand in so far as Federal Courts are held to have jurisdiction to consider and pass upon cases involving alleged violations of the Sherman Act so long as such violations are based upon fraudulent misrepresentations.

But to return to the Court of Appeals' statement that the only ground of jurisdiction asserted has relation to the Sherman Anti-Trust Act, the best evidence that such was not the only ground upon which jurisdiction was maintained is the language of the opinion of the District Court in taking jurisdiction (Rec. p. 32):

> "Jurisdiction and the relief sought are predicated (1) upon the hypothesis that plaintiffs' cause of ac-

tion arises under the National Labor Relations Act, Sections 151-166, Title 29, U. S. C. A., and involves a construction of that Act; that this Act gives to plaintiffs the right to be unmolested in the discharge of its legal duty imposed by the Act to deal in collective bargaining matters with one party and one party alone—the representatives of the majority of its employees, and that if that right is violated injunctive relief may be resorted to; and (2) that the maintenance of a secondary boycott for the purpose of enforcing the negotiation of a collective bargaining agreement with less than a majority of plaintiffs' employees, interfering as those acts do with interstate commerce, is a violation of the Sherman Act (Sections 1-7, incl., Title 15, U. S. C. A.) as amended by the Clayton Act (Sections 12-28, incl., Title 15, U. S. C. A.).

"The amount in controversy being sufficient and plaintiffs' right to relief sought depending upon the application and construction to be given the National Labor Relations Act upon a question heretofore not finally determined, jurisdiction of the parties and subject matter exists under clause (a) of Subsection (1) Section 41, Title 28, U. S. C. A."

Thus it appears that jurisdiction is predicated upon two grounds and not the one recited in the concurring opinion, and primarily the ground relied upon for jurisdiction is the application and construction of the National Labor Relations Act on a question not previously determined.

It has been said that "when a complaint asserts a right created by Federal law it presents a suit which may properly turn upon a construction of that law; and such a suit 'arises out of' the law for purposes of Federal jurisdiction." **McGoon v. Northern Pacific R. R. Co.**, 204 Fed. 998, 1005. The National Labor Relations Act creates a right in workers to have their majority-chosen rep-

resentatives receive exclusive recognition from their employers. It thus imposes a duty upon the employer to grant such recognition. The Act thus creates a correlative right in the employer to be free from molestation from a union which does not have the designation of a majority of the employees in the given unit. The National Labor Relations Act in fact prohibits an employer from entering into a closed shop exclusive recognition with a labor union unless such union represents a "non-coerced" and "non-assisted" majority. **National Labor Relations Act**, 29 U. S. C. A., Sections 158 (3) and 159 (a); **Jefferson Electric Co. v. National Labor Relations Board**, 102 Fed. (2d) 949, 955; **National Labor Relations Board v. National Motor Bearing Co.**, 105 Fed. (2d) 652, 660. The right of the employer to be free from molestation by a union which does not represent a "non-coerced" and "non-assisted" majority is at least a right which is created by implication from the language of the National Labor Relations Act and it is held that for the purpose of determining whether or not a Federal court has jurisdiction a case may arise under the laws of the United States when it arises out of an implication of the law. **Tennessee v. Davis**, 100 U. S. 257, 25 L. Ed. 648. Again, for the purpose of testing jurisdiction, it is held that there are two essentials—(1) an actual dispute between parties as to the meaning of a law of the United States; and (2) materiality of construction of such law to a determination of the case. **Smith v. Kansas City Trust Co.**, 255 U. S. 180, 65 L. Ed. 577, 41 S. Ct. 243. It is likewise held in the last cited case that the claim of Federal question must be not merely colorable but must rest upon a reasonable foundation. We think it is clear that because of the construction required in this case of the National Labor Relations Act, all of these tests of jurisdiction are met. It is well settled that if jurisdiction is obtained on one ground the

Court can and will decide all questions in the case. We submit that the District Court without question had jurisdiction of this legal controversy.

Wherefore your petitioners pray that this Court issue a writ of certiorari herein, and that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit rendered herein be reversed.

Respectfully submitted,

GUSTAVUS A. BUDER, JR.
Counsel,

CHARLES H. SPOEHRER,
Of Counsel,
For Petitioners.